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SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 715

STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, Petitioners,

vs.

UNITED STATES OF AMERICA, Respondent.

MOTION.

The State of Kansas believes that the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of United States v. Champlin Refining Company and State of Oklahoma, 156 F. (2d) 769, is contrary to the settled decisions of the Supreme Court of the United States and of the Supreme Court of Kansas. The State of Kansas further believes that such decisions would unjustly disturb the peaceable ownership and use of the beds of its public rivers which this state has enjoyed for many years by virtue of those decisions.

For the above reasons, the State of Kansas respectfully moves this Honorable Court that it be permitted to file the attached brief, amicus curiae, in support of the petition of the State of Oklahoma for writ of certiorari in this action.

A. B. MITCHELL,
Attorney General of the
State of Kansas.

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No. 715

STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, Petitioners,

vs.

UNITED STATES OF AMERICA, Respondent.

BRIEF, AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The State of Kansas owns the beds of both the Arkansas and Kansas Rivers throughout their course within the State of Kansas by decisions of the Supreme Court of Kansas, holding that such rivers are navigable and that the beds thereof belong to the State. The principal decisions of the state court affecting the Kansas River are Wood v. Fowler, 26 Kan. 682, and State v. Akers, 92 Kan. 169. The principal state decision affecting the Arkansas River is Hurst v. Dana, 86 Kan. 947. The case of State v. Akers, supra, was appealed to the United States Supreme Court under the title of Wear v. Kansas, 245 U. S. 154, and was affirmed in all respects by that Court. It was again affirmed in Brewer-Elliott Oil and Gas Company v. United States, 260 U. S. 77.

The title of the State was contested in Wear v. Kansas by riparian owners of land on the bank of the Arkansas River. Their predecessors in title to a portion of these lands were Wyandotte Indians who, prior to Kansas statehood, had received Federal patents to such riparian lands.

As shown in the opinion in Wear v. Kansas, supra, the territorial legislature of Kansas had adopted the common law with reference to riparian ownership, and had declared the Kansas River to be non-navigable. These enactments of the territorial legislature, if enforceable, would have extended the title of the Indian allottees to the center of the stream at the time they received their patents.

The Supreme Court of the United States, however, speaking through Mr. Justice Holmes in Wear v. Kansas, held in effect that the territorial legislature was without power to fix riparian rights and that the determination of such rights was reserved for the State. The Court further held that the navigability of the river was a "question of state law" and that it was to be "established once for all, not perpetually retried."

The case of Wear v. Kansas has become a landmark not only on the special holding that, for the purpose of defining private titles a state may take judicial notice of the navigability of its rivers, but also as a forerunner of the doctrine of Erie v. Tompkins, 304 U. S. 64.

In one of his noted dissents, Mr. Justice Holmes in Black and White Taxi Cab and Tr. Co. v. Brown and Yellow Taxi Cab and Tr. Co., 276 U. S. 533, cited Wear v. Kansas in support of the doctrine which later became the basis of Erie v. Tompkins, his language being as follows:

> "The common law so far as it is enforced in a state, whether called common law or not, is not the common law generally *but the law of that state existing by the authority of that state without regard to what it may have been in England or anywhere else.* It may be adopted by statute in place of another system previously in force. Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 345, 53 L. ed. 822, 825, 29 Sup. Ct. Rep. 493. But a general adoption of it does not prevent the state courts from refusing to follow the English decisions upon a matter where the local conditions are different. Wear v. Kansas, 245 U. S. 154, 156, 157, 62 L. ed. 214, 218, 38 Sup. Ct. Rep. 55, Ann Cas. 1918B, 586. It may be changed by statute, Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 378, 37 L. ed 772, 777, 13 Sup. Ct. Rep. 914, as is done every day. It may be departed from deliberately by judicial decisions, *as with regard to water rights*, in states where the common law generally prevails." (Emphasis will be ours throughout this brief unless otherwise noted.)

In Arizona v. California, 283 U. S. 452, this Court, speaking through Mr. Justice Brandeis, cited Wear v. Kansas as follows:

> "But a court may take judicial notice that a river within its jurisdiction is navigable. United States v. Rio Grande Dam & Irrig. Co., 174 U. S. 690, 697, 43 L. ed. 1136, 1139, 19 S. Ct. 770; Wear v. Kansas, 245 U. S. 154, 158, 62 L. ed. 214, 218, 38 S. Ct. 55, Ann. Cas. 1918B, 586."

The Federal Courts in Kansas have on two separate occasions followed the doctrine of Wear v. Kansas.

The title of the State of Kansas to the Arkansas River (the same river involved in the case at bar) was put in issue in Jackson-Walker Coal and Material Com-

pany v. Hodges (1918), 283 Fed. 457. In that case the United States District Court for the District of Kansas upheld the title of the State in the following language:

> "While, from a consideration of the proof taken and submitted in this case, and from that general knowledge common to all men, there can be no possible doubt whatever the Arkansas River at the point in controversy in this case is not now, and has not, since its known history, been navigable in point of fact; that is to say, the stream in its ordinary condition does not afford a channel for useful commerce, hence is not navigable within the meaning of acts of Congress on that subject as defined in the Montello, 20 Wall. 430, 22 L. ed 391; Leovy v. United States, 177 U. S. 621, 20 Sup. Ct. 797, 44 L. ed. 914, United States v. Rio Grande Irrigation Co., 174 U. S. 690, 19 Sup. Ct. 770, 43 L. ed. 1136; South Carolina v. Georgia, 93 U. S. 4, 23 L. ed. 782; The Robert W. Parsons, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. ed. 73, and many other cases. However, from what has gone before, it must, I think, be held, in this case, the navigability of the stream in point of fact is not the true test. On the contrary, the true test is whether the Arkansas River at the locus in quo must be regarded as navigable under the local laws of the State of Kansas, as ordained and established for the purpose of the unvarying determination of the property rights of riparian owners along its course through the state. *That by the local property rule established in this state, once for all, the title to the bed of the Arkansas River within the state is vested in the state and not in the adjoining riparian owner.*"

The above case was cited with approval by the Circuit Court of Appeals for the 8th Circuit in United States v. Holt State Bank, 294 Fed. 165, (affirmed by

the Supreme Court of the United States in 270 U. S. 55) in the following language:

> "Moreover, since the settled law has become that the rights and interests of riparian owners on the shores of lakes and rivers to the lands under the waters upon which they border are determinable by the law of the state in which the lands lie, and since such rights and interests are often conditioned by the navigability of such waters, it logically follows, and has long since become the law of the land, with some exceptions not material in the consideration of this case (Brewer-Elliott Oil & Gas Co. v. United States, (C. C. A.) 270 Fed. 100, 107, 109), that in the determination of the rights of riparian owners to the lands under the water upon which their lands border, *what shall be deemed a navigable water must be determined by the law of the state in which the riparian lands lie.* (Donnelly v. United States, 228 U. S. 243, 262, 33 Sup. Ct. 449, 57 L. ed. 820, Ann. Cas. 1913E. 710; Jackson-Walker Coal & Material Co. v. Hodges, (D. C.) 283 Fed. 457, 462.)"

The title of the State to the Arkansas River bed was again in issue in Shore v. Shell Petroleum Corporation (1931), 55 F. (2nd.) 696. In that case it was contended that the Osage Indians had received an express grant of the river bed and that the case was therefore governed by the exception to the established rule as applied in Brewer-Elliott Oil and Gas Company v. United States, 260 U. S. 77.

The United States District Court held, however, that the Osages had relinquished their title and again upheld the title of the State in the following language:

> "The difficulty with the argument is that the Indians did not own the fee title, that plaintiffs did not deraign their title from the Indians, *and that the question of navigability in fact is not the true test*

> *with which we are confronted.* It appears to be well settled that where the litigation over the property rights *is between private parties, the local law regarding navigability controls,* and so the question here is, not whether the Arkansas River in Kansas was navigable in fact prior to the issuance of the patents to the riparian owners, but whether under the law and public policy of the state it was deemed to be navigable."

This decision was affirmed by the United States Circuit Court of Appeals for the 10th Circuit, 60 F. (2d) 1, in which opinion the Court said:

> "In Wear v. Kansas, 245 U. S. 154, 38 S. Ct. 55, 62 L. ed. 214, Ann. Cas. 1918B, 586, it was held that, if a state court takes upon itself to know without evidence whether a river is navigable, a Federal court cannot say it erred. And in Donnelly v. United States, 228 U. S. 243, 262, 33 S. Ct. 449, 455, 57 L. ed. 820, Ann. Cas. 1913E, 710, the court said:
>
> > 'But it results from the principles already referred to that what shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several state.'
>
> "See, also, Jackson-Walker Coal & Material Co. v. Hodge (D. C.) 283 F. 457. So we apply in this case the rule of property established by the Supreme Court of Kansas."

The title of the State had been earlier contested in Kansas v. Colorado, 206 U. S. 46. Justice Brewer stated, however, that each State had full jurisdiction over the lands within its borders, including the beds of streams.

On the basis of the above decisions, the State of Kansas has exercised complete ownership of the beds of the Arkansas and Kansas Rivers for a great many years.

Oil has been discovered in several fields along and in the Arkansas River, and the State has issued many oil and gas leases covering the river bed. The rentals and royalties derived from these leases have at all times been collected by the State for the benefit of the public, and its right and title to the river bed and to the income therefrom has never been successfully put in question since the decision of the Supreme Court of the United States in Wear v. Kansas, supra. In many other ways the beds of these rivers are extremely valuable to the public, and the State of Kansas most earnestly believes that its title thereto is settled and is immune from the claims of any persons whomsoever.

The decision of the Circuit Court of Appeals in the present case, however, rejected a similar rule of navigability of the State of Oklahoma and placed in its stead a finding of non-navigability-in-fact made by a United States District Court more than thirty-five years after the issuance of the patents there under consideration.

The Circuit Court attempted to draw a distinction that in the Oklahoma case the patents were issued before statehood and that the riparian rights attaching to the patents were governed by the law of the Territory of Oklahoma.

The State of Kansas objects seriously to this holding. It would mean in our state, for example, that owners of lands along the Kansas or Arkansas Rivers, whose patents happen to have been issued prior to statehood, may now file suits in the Federal Courts, using the Circuit Court's opinion to claim the state's title. The riparian owners of lands adjoining the land in controversy in Wear v. Kansas would thus be governed by a different rule of ownership than were the riparian owners in Wear v. Kansas, and the same would be true of all

land along the river, except only those whose rights were adjudicated in that noted case.

The confusion of titles which would result would be entirely unwarranted, as the effect of the territorial law has been settled by this Court in Wear v. Kansas, supra. In that case, as stated above, the patents in question were issued prior to statehood but this Court held that the territorial law did not govern the riparian rights attaching to the patents.

This holding was in accordance with an earlier decision of this Court in Kansas v. Colorado, 206 U. S. 49. In that case it was contended that laws of the Territory of Colorado fastened the common law principle of equal use of flowing streams upon that state, and gave its citizens vested rights to demand the continuation of such principle. This Court rejected such contention, however, and held that the laws of the state which was later formed govern such rights and that the State of Colorado had power to adopt the opposite rule of prior appropriation. The Court said:

> "In the argument on the demurrer counsel for plaintiff endeavored to show that Congress had expressly imposed the common law on all this territory prior to its formation into states. (Citations) But when the States of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to other states (Citations), and Colorado, by its legislation, has recognized the right of appropriating the flowing waters to the purposes of irrigation."

It therefore appears to the State of Kansas that the decision of the Circuit Court of Appeals in the case at bar, is directly contrary to the holding of the United States Supreme Court in Wear v. Kansas, supra, as well

as to the doctrine of Erie v. Tompkins, 304 U. S. 64. It also appears that such decision would encourage riparian owners along the banks of the Arkansas and Kansas Rivers in this State to bring a multitude of suits in the Federal Court, in the belief that they can wrest the title to the beds of those rivers from the State by merely obtaining findings of non-navigability in fact, from such Courts. The confusion of titles which would necessarily result from such litigation would not only be contrary to the settled doctrines of this Court but would also impair the sovereignty of the State of Kansas over the beds of its public streams which has been recognized, by repeated decisions of this Court, to be the prerogative of all States of the Union.

For the above reasons it is respectfully stated that it appears to the State of Kansas that the decision of the Circuit Court of Appeals for the Tenth Circuit in this action should be reviewed by this Honorable Court and that upon such review the decision should be reversed.

A. B. MITCHELL,
Attorney General of the
State of Kansas,
Amicus Curiae.